15323

(18,745.)

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 165.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner,*

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN AND BENJAMIN F. JONES, JR., ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

Emphasizing the fact that the materials furnished by the respondents herein to the petitioner herein, which were the foundation of the cause of action set out in the amended bill of complaint, were furnished and delivered as appeared by the said bill of complaint, to the petitioner between April 16th, 1895, and January 29th, 1896, and were used in the construction of the building of the petitioner before the decision of the Supreme Court of Ohio in *Young vs. The Lion Hardware Company*, 55th Ohio State, 423, was announced, holding that Section 3184 of the Revised Statutes of Ohio, as amended, was unconstitutional, and before any decision of the said Supreme Court of Ohio had been rendered holding said section to be unconstitutional, we adopt the statement in the brief of counsel for petitioner as a substantial statement of this case.

The law here involved is contained in Sections 3184, 3185 and 3185a, Revised Statutes of Ohio, which sections read as follows:

> "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing, constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material or machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."
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> "Sec. 3185. Such person, in order to obtain such lien, shall, within four months of the time from performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder and a description of the land on which the gas well, oil well or other wells are situated, or

the land on which the house, mill, manufactory, or other buildings or appurtenances, fixture, bridge or factory, or other structure may stand, or to which it may be removed, and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof, and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"Sec. 3185a. In all cases where the labor, machinery or material referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors, material-men or laborers, fix an unreasonably low price in the original contract for any work or material for which a lien is given under Section 3184, the Court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

ARGUMENT

UPON CONSTITUTIONALITY OF LIEN LAW, AND EFFECT OF THE DECISION OF THE OHIO SUPREME COURT.

In behalf of respondents herein, we claim,

I.

That the decision of the Supreme Court of Ohio, above referred to, is not binding upon the Courts of the United States for three reasons:

(*a.*) The cause of action set out in the bill of complaint accrued before that decision was rendered.

(*b.*) The former decisions of the Supreme Court of Ohio, upon similar contracts and liens, are in conflict with that decision, and the cause of action of the respondents herein accrued after such former decisions were rendered.

(*c.*) The question is one of general jurisprudence, and commercial law.

II.

That the said section as amended, does not deprive the owner of property of the right of possessing and protecting the same.

III.

That it does not deprive the owner of property of the same without due process of law.

IV.

That it does not impair the obligation of contracts.

V.

That it does not deny to certain classes, to-wit, owners of buildings or other structures described in the law, the equal protection and benefit of the law as guaranteed by Article 1, Section 2, of the Constitution of the United States, and by the Constitution of Ohio, and is not in contravention of any provision of either the Constitution of the United States, or of the State of Ohio.

ARGUMENT.

THE CAUSE OF ACTION SET OUT IN THE BILL OF COMPLAINT ACCRUED BEFORE THE DECISION IN YOUNG VS. THE LION HARDWARE COMPANY.

The cause of action which is the foundation of the suit at bar, to-wit, the material furnished, was so furnished and delivered by the respondents, and used in the construction of the hotel of the appellant, before the decision of *Young vs. The Lion Hardware Company* was announced, and before any decisions holding the statute in question to be unconstitutional.

When the respondent's right of action accrued, they had the right to presume that the statute was constitutional, and that their rights thereunder would be protected. Under these circumstances, the rule, we think, is clearly established, that the Courts of the United States will act independently; and while giving due weight to the decision of the Ohio Court, will still independently decide whether or not such decision is, in fact, correct.

Upon this point we refer the Court to the following:

> "So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid any unseeming conflict with well considered decisions of the State Courts. As, however, the very object of

giving to the national Courts jurisdiction to administer the laws of the State in controversies between citizens of different States was to constitute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

Burgess vs. Seligman, 107 U. S., 32.

"The decision of the highest Court of a State, construing the Constitution of the State, is not binding upon this Court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this Court, and when the rights which it affects here were acquired before it was made."

Carroll County vs. Smith, 111 U. S., 556.

"While the Courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decisions in the State Court, it is the settled doctrine of this Court, that rights accruing under one construction will not be lost merely by a change of opinion in the State Court; and where such rights have accrued, before the State Court has announced its construction, the Federal Courts, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment."

Anderson vs. Santa Anna, 116 U. S., 356.

The rule laid down in these cases is referred to with approval in *Miller vs. Ammon,* 145 U. S., 421, and followed in the very recent case decided in the Circuit Court of Appeals of the Sixth Circuit by His Honor Judge LURTON, in *Louisville Trust Company vs. City of Cincinnati,* 76 Federal Reporter, 296. The second section of the syllabus is as follows:

"Federal Court—following State decisions—Where a contract or obligation has been entered upon or before there has been any judicial construction of the State statute upon which the contract or obligation depends, by the highest Court of the State, a Federal Court, obtaining jurisdiction of the question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State Court, exercise an independent judgment as to the validity and meaning of such contract, and will not necessarily follow opinions of the State Court construing such statute, if such decision be rendered after the rights involved in the controversy originated."

A complete analysis of all the cases under the rule is also found in the note to *Wilson vs. Perrin,* 11 Circuit Court of Appeals Reports, page 66.

See also—

Central Law Journal, Vol. 35, p. 322.
American & English Encyclo. of Law, Vol. 27, p. 600, and notes there cited.
Boles vs. Brunfield, 120 U. S., 750.
Barnum vs. Okalona, 140 U. S., 396.

This question was elaborately discussed by His Honor Judge LURTON in the decision of this case in the United States Circuit Court of Appeals, Sixth Circuit. In the opinion there delivered (86 Fed. Rep., 372), we find the following:

"When a citizen of one State enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by the Court of the United States. That right does not by any means involve the application of a different rule of decision, for the Judiciary Act requires that the law of the several States shall be regarded as rules of decisions, in trials at common law, where they apply. But even the decision of the highest Courts of the State, by whose law the rights of the parties are to be

ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon the Courts of the United States. The question is, when does it apply? In the past this inquiry has involved no little friction between the Courts of the Union and those of the States, but the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made, that Court has, in an authoritative way decided:

"*First.* That such decisions are not necessarily obligatory upon Courts of the United States where they affect contracts which were valid under the constitution and laws of the State, as interpreted and enforced by its highest judiciary tribunals at the time they were entered upon.

Rowan vs. Runnels, 5 Howard, 134.
Ohio Life & Trust Co. vs. Debolt, 16 Howard, 432.
Gelpcke vs. City of Dubuque, 1 Wallace, 175.
Olcott vs. Supervisors, 16 Wallace, 678.
Taylor vs. Ypsilante, 105 U. S., 60.
Douglas vs. County of Pike, 101 U. S., 677.
Louisville Trust Co. vs. Cincinnati, 47 U. S. A., 36 to 46."

In *Rowan vs. Runnels, supra,* Chief Justice TANEY said:

"Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and from the time they were made regard them as conclusive in all cases upon the constitution to their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this Court, were lawfully made." * *

"*Second.* Neither are such decisions obligatory upon Courts of the United States when thereby the validity of contracts between a citizen of the State and a citizen of another State is affected, which were

executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess vs. Seligman, 107 U. S., p. 20-33.
Pleasant Township vs. Aetna Life Ins. Co., 134 U. S., 67-72.
Louisville Trust Co. vs. Cincinnati, 76 Fed. Rep., 296."

This rule has been followed in the case of *Speere vs. The Board of County Commissioners*, U. S. C. C. Appeal Reports, Vol. 32, page 103. The 11th section of the syllabus of that case is as follows:

"Decisions of State Courts as to their statutes, which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was any judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the Courts of the United States."

On page 113, the Court said:

"There are, however, two reasons why the decision of the Supreme Court of Kansas, to which we have averted, is not controlling in the case at bar. The first is that it was not rendered until after the rights of the plaintiff were vested under a law which stood unchallenged and without adverse judicial construction when he purchased his warrant. The plaintiff was a citizen of Illinois. He bought this warrant and thereby entered into a contract with the defendant, a citizen of the State of Kansas, before the statute in question had been declared to be void. By this action he acquired the right, under the constitution and laws of the United States, to have his contract interpreted, and his rights enforced in a Court of the United States, and a *fortiori* the right to the independent judgment of that Court upon the legal questions his case presents. This case falls within one of the recognized exceptions to the

general rule which the defendant invokes. That exception is, that decisions of the State Courts which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was judicial construction of the constitution or statute which seemed to authorize the contracts, are not obligatory upon the Courts of the United States."

In his opinion delivered in this case below, Judge SAGE discussed this question thoroughly, and held that it was the duty of the Federal Courts to independently look into the question of the constitutionality of the statute involved. We quote from his opinion, 79 Fed. Rep., 480:

"The gist of the Federal cases cited is, that under the circumstances stated, the Federal Courts will not apply the original rule that the decisions of the highest Court of the State, construing and passing upon the validity of the State statute, is binding. It will be necessary, therefore, to look into the question of the constitutionality of the statutory provisions involved, independently of the decisions made by the Supreme Court of Ohio."

FORMER DECISIONS OF THE SUPREME COURT OF OHIO UPON SIMILAR CONTRACTS AND LIENS, ARE IN CONFLICT WITH THE DECISION OF YOUNG VS. THE LION HARDWARE COMPANY, AND THE CAUSE OF ACTION OF THE RESPONDENT ACCRUED AFTER SUCH FORMER DECISIONS WERE RENDERED.

The decisions of the Supreme Court of Ohio, prior to that announced in *Young vs. The Lion Hardware Company*, and in cases involving the same principle of constitutional construction, are in conflict with that opinion, and under these decisions, and under the law of Ohio, as understood and adjudicated up to that time, the act complained of was constitutional. Under such circumstances, the rule is equally clear, not only that the United States Courts in cases within their jurisdiction will act

independently, but that if they find that former decisions of the State Courts do conflict it will follow the early decisions as to all rights accruing under them, and before the last decision.

> "Indeed the duty imposed upon this Court to enforce contracts honestly and legally made, would be vain and nugatory, if it were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a State Court would be no protection to a contract, if we were bound to follow the judgment which the State Court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its Courts of Justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State, or decision of its Courts, altering the construction of the law."
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> *Ohio Life & Trust Co. vs. Debolt,* 16 Howard's Reports, p. 432.

The authorities upon this subject are reviewed in *Douglas vs. Pike County,* 101 U. S., 677, and the rule is there stated as follows:

> "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as the contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

It is true there had been in Ohio no adjudication of the exact point decided in *Young vs. The Lion Hardware Company*, prior to that case; but the principles involved in that decision had been settled in many cases which are, in effect, if not in words, overruled by the last decision.

As early as the First Ohio Reports, the doctrine was announced in *Smith vs. Parsons*, p. 240, that:

> "The Legislature has a right by law to regulate contracts, to determine their effect and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement; and it is more correct to say, that the law has in part made the contract, than that it has changed it. * * * On any other view of the question, the power of the State to legislate on the subject of contracts will be materially impaired; for if it be admitted that a bankrupt law, operating on an after-made contract in the manner prescribed and as was understood by its parties, be unconstitutional, or if the contracts be not made with reference to existing laws, so as to imply an assent to their provisions, it must follow that statutes of limitation, statutes against usury, gambling, sale of offices, frauds and perjuries, and the like, must be void, because they impair the obligation of contracts not prohibited by the constitution, and which would have been legally binding had not these statutes been made."

This decision is but a reiteration of the principle announced in the *Dartmouth College case*, and was followed and approved in *Weil vs. The State*, 46 O. S., p. 450. The Court in that case, p. 452, said:

> "Does the statute impair the obligation of contracts? It does not in terms purport to operate retroactively, or apply to contracts entered into before its enactment,

but only to those made after it took effect. The obligation of a contract, is the duty, which the law at the time of making it, imposes upon the parties. As was said by Mr. Justice WASHINGTON in *Ogden vs. Saunders*, 12 Wheat., 213, 'the law of the contract forms its obligation.' Judge COOLEY, in his work on Constitutional Limitations, p. 346, says: 'The obligation of a contract depends on the laws in existence when it was made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation, to perform them by the one party, and the right acquired by the other.' In an interesting discussion of this subject in *Smith vs. Parsons*, 1st Ohio, 236, it is said by BURNETT, J., in the opinion of the Court, that 'The Legislature has a right, by law, to regulate contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than it has changed it.' Persons contracting after the passage of the statute, could not know the law as one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts and defining their effect. The learned judge further says: 'Instead of determining the valdity of the statute by reference to the alleged intention of the parties to the contract, we must fix the legal intent of the parties, as well as the nature and extent of the obligation of the contract, by reference to the statute.' And, again, 'Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed part of the contract.' "

If the authority of these cases be correct, the Legislature, having full and ample power to legislate concerning contracts subsequently made, to regulate the mode and manner of their making, and of their enforcement, has full and ample power to regulate and control and prescribe the manner and method of making and enforcing building contracts, and to fix such regulations regarding them, and to provide such security for those engaging therein, as it may see fit.

These decisions were not upon the subject of Mechanics' Liens, nor did they specifically construe building contracts; but as there is no difference in the eye of the law between building contracts and other contracts, the judicial determination that the power to regulate one class is constitutional, so long as it stands, controls and determines the power to regulate the other class, and *Smith vs. Parsons* and *Weil vs. The State,* in effect, decide that legislative power over the subject of mechanic's liens or building contracts is absolute and constitutional, and the decision is as binding as if they had had the exact question before them. But in addition to these cases there had been, before the decision relied upon by appellants, two decisions of the Supreme Court of Ohio, upon the subject of mchanic's liens, and prior to the contract set out in the complaint, which were directly in conflict with the rule announced in *Young vs. The Lion Hardware Company.*

In *Railway vs. Cronin,* 38 Ohio State, 122, and in *Railway vs. McCoy,* 42 Ohio State, 251, the Supreme Court enforced liens under the Act of March 31, 1874, 71 Ohio Laws, 51. That act was, in principle and effect, as applied to railway companies, a counterpart of Section 3184 as amended. It provided that the railway company, regardless of any contractual relations it might have with laborers or employes of sub-contractors, should pay each person performing labor or furnishing material under a contract, express or implied, with the original contractor or any sub-contractor; providing, further, for notice equivalent to that prescribed in Section 3184. The intention of the two statutes is identical, to-wit., to protect the laborer or the material man, or the sub-contractor, and to secure him the amount due for his labor or material.

In the case of the railway company the contract is specific, that such laborer or material man shall be paid. In cases arising under Section 3184 the provision is, that he shall have a lien if not paid. In neither case is there any pretense or intention that his payment shall be contingent on any amount remaining due the principal contractor. The Act of March 31, 1874, gives notice to the railway company to look out for the payment of the laborers and sub-contractors, and that if payment be made to the principal contractor, without so taking care of them, it will be at its peril. Section 3184 gives notice to the owner of the building that he must likewise look out that the laborers and sub-contractors and material men are paid, or he will be at the peril of a lien on his property.

It will be claimed, doubtless, that the cases referred to, construing the Act of March 31, 1874, did not bring directly in controversy the constitutionality of the act. The Court is not presumed to enforce an unconstitutional act, and its decisions in these cases enforcing liens was a distinct affirmance of the validity and constitutionality of the legislation.

In view of these decisions, if there were no other reason, this Court, in this case, not only is not bound by the decision in *Young vs. The Lion Hardware Company*, but under the rule should follow the principle of the prior decisions, and in so far as these respondents are concerned, enforce their lien, leaving the case of *Young vs. The Lion Hardware Company* to be a rule for cases governing contracts arising subsequently thereto.

THE QUESTION IS ONE OF GENERAL JURISPRUDENCE AND COMMERCIAL LAW.

The question of the constitutionality of mechanics' liens is not, within the meaning of the cases holding State decisions upon local statutes final, a question of purely local or State law, but is rather a question of general jurisprudence, involves public policy, relates to the unrestricted powers of the legislature, and is in a sense a question of general commercial law, and as such should be considered by the United States Court independently of, and without reference to the State decisions, except in so far as the State decision may be entitled to weight by virtue of its

reason. The Court in its decision in the *Lion Hardware Company case,* did not find that the acts in controversy violated any of the express provisions of the State constitution, nor is there any pretense that it violates any of such express provisions. The only ground of the decision was, that the act in some way violated the general and indefinite provisions of the Bill of Rights, and exceeded what was known as the general and unrestricted powers of the Legislature. The question falls directly within the scope of the decision of Justice STRONG in *Olcott vs. Supervisors,* 16 Wallace, p. 678.

The Court on page 690 says:

> "This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the Legislature had not general legislative power, or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought out in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State Court can conclusively determine for us."

As in that case, it is not here claimed, and cannot be claimed, that the Legislature has no power to legislate upon the subject of mechanics' liens. It is not claimed that it cannot control and prescribe the rules governing such liens. It was only claimed by the Court that in the particular statute the Legislature had exceeded its powers as to one of these rules or conditions.

The decision of the Court was upon a part of the constitution common to all constitutions, and was not a construction of any local or special part of the constitution. Its decision had reference as much to the constitution of one State as to

another State, and attempted to prescribe a rule of general constitutional construction which might be applicable to any other State, or even to the constitution of the United States, as to the State of Ohio. This is a question of general jurisprudence, and this Court must decide it independently. While it is true that mechanics' liens are in their nature statutory and governed by State laws, yet being a part of the statute law of every State and Territory and recognized by Congress as a part of the statute law of the District of Columbia, and in the language of Justice BRADLEY, in 113 U. S., p. 516, "Standing on the basis of natural justice," the law governing them may be considered in the same light as those governing and regulating general commercial law, and, therefore, in cases of proper jurisdiction, the subject of the independent construction of the Federal Courts, regardless of local decision. Local decisions can only be binding in cases of construction of particular local statutes, or in cases of invasion of some specific provision of local constitutions. No such decision can be binding where it affects or construes only the general powers of the Legislature over the subject.

This view contended for in the argument and brief of respondents in the lower Court was sustained by the Court of Appeals in its opinion delivered by His Honor, Judge LURTON, 86 Fed. Rep., 375:

> "With every disposition to come to an agreement with the views of the Supreme Court of Ohio, in the interest of harmony of decisions, we are, nevertheless, compelled to express our inability to assent to the conclusion of that learned and impartial tribunal as to the validity of the legislation under which complainants' rights are claimed. *The decision of that Court was not placed upon any merely local or peculiar provision of the Constitution of Ohio. The ground upon which they placed their objection to the law was, that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.*"

And on page 376:

> "We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The 'rights' supposed to be violated are rights deemed fundamental under the terms of popular and constitutional government, and like declarations are to be found in all or most of our State constitutions. *The question is, therefore, one of general law, having as much reference to the constitution of any other State as to that of Ohio.*"

See also

McCullough vs. Commonwealth of Virginia, 172 U. S. Supreme Court Report, 382.

Southern Pine Co. vs. Hall, 44 C. C. A., 363.

II.

SAID SECTION AS AMENDED, DOES NOT DEPRIVE THE OWNER OF PROPERTY OF THE RIGHT OF POSSESSING AND PROTECTING THE SAME.

III.

IT DOES NOT DEPRIVE THE OWNER OF PROPERTY OF THE SAME WITHOUT DUE PROCESS OF LAW.

IV.

IT DOES NOT IMPAIR OBLIGATION OF CONTRACTS.

The lien sought to be enforced in the case at issue was for materials furnished in and about the construction of a building commenced after the passage of the act of April, 1894, and all contracts and agreements set out in complaint's Bill were made and entered into after the passage of that act.

The contract having been made during the existence of the statute, it must, therefore, be considered as forming a part of the contract, and does not impair the obligations of that contract nor deprive appellant of its property without due

process of law. The rule that all contracts are subject to the conditions and obligations imposed by existing law is too well settled to be controverted. It has been the established law ever since the Dartmouth College case, in 4th Wheaton. *Parsons vs. The State,* 1st Ohio Reports, 236, and *Weil vs. The State,* 46 Ohio State, 450, both referred to above, thoroughly discuss this question and establish the rule in Ohio.

> "The obligation of a contract," it is said, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."
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> Cooley on Constitutional Limitations, 6th Edition, 344.

> "The power of the Legislature, as to all future transactions, to regulate and control contracts by perscribing the manner in which they shall be made * * * by declaring what future voluntary acts of parties in relation to a particular subject-matter shall be deemed contract, and, if it pleases, by creating implications from such acts from which certain declared obligations shall flow, cannot be denied or doubted."
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> *Steubel vs. Mil. & Miss. R. R.,* 12 Wis., 67.

> "No reason has been suggested why the Legislature could not exempt all interests in landed estate from execution and sale under judgments against the owner, and perhaps all his personal property. However this may be, it is very certain that the established construction of the constitution of the United States against impairing the obligations of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and, therefore, cannot be held to impair their obligation."
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> Justice MILLER in *Denny vs. Bennett,* 128 U. S., 495.

"What may be the effect of those statutes in this regard upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to the statute, but long subsequent thereto. When the complainant took its mortgage, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction. The cases referred to by counsel to the contrary, holding void a consent exacted contrary to the constitution, have no bearing upon the present cases."

Provident Institution vs. Jersey City, 113 U. S. Reports, 514.

"The inhibition of the constitution is wholly prospective. The State may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effects."

Edwards vs. Kearsey, 98 U. S., 595.

Applying this rule to mechanics' liens, Phillips on Mechanics' Liens, Sec. 30, says:

"Power as to Future Coutracts.—As to future contracts, there is no doubt the Legislature may make such regulations affecting the right of lien between the parties, and priorities of third persons, that shall be deemed advisable. Thus, an act may be passed to take effect in the future, subordinating even prior judgment and mortgage liens to subsequent mechanics' liens, but such liens as have accrued prior to the passage of the act cannot be thus affected. Neither can the lien be extended so as to impair the obligation of contracts or

liens of duly recorded incumbrances antecedent to the act. If enacted by prior statute, mechanics' liens may be made liens on all the property possessed by the debtor. On the other hand, the Legislature has the right to prefer any other lien over those of mechanics; and where it declares that a widow's lien shall be preferred, excepting those of vendors for purchase money or real estate, the rule of *expressio unius alterius* prevails, and mechanics' liens will be subordinated to the widow's right. Indeed, there is no provision in the constitution which precludes the Legislature from declaring a statutory lien, in respect to future contracts, in favor either of the contractor or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are preformed. Every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection.

"The constitutional validity of such statutes securing to sub-contractors, and others furnishing labor or material for a contractor, irrespective of the state of account between the owner and the contractor, is well established; and it is established upon the ground that such statutes annex the lien as an incident to the contract to the owner with the contractor, such contract being the evidence of the authority of the contractor to charge the owner's property with liabilities incurred by him in performing his contracts."

Jones on Liens, Vol. 2, p. 286.

"Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed or the promised materials are furnished,

> the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time."
>
> *McMurray et al. vs. Brown*, 91 U. S. Reports, p. 266.

The contract then, following the language of *Smith vs. Parsons*, having received its impress from the law, and being co-existent with it, and, therefore, not being injured or impaired by the law, the owner of the building against whom the lien or contract is sought to be enforced, cannot be said to be deprived of his property without due process of law. Ample means are given him to avoid any injurious consequences arising out of the law. He can be his own builder. He has his remedy by suit against the contractors in case he has to pay for material or labor not paid for by the contractor. He can demand a bond and protect himself against the laches of an irresponsible contractor. He can arrange his payments so that the time limited by the statute for the filing of a lien shall have expired before the payments are made. He can see himself to the application of payments when made, and to the claims of sub-contractors, material men or laborers. There is no necessity for any prudent man being injured, in any way, by the provisions of the existing statutes. If he is injured, it is only because he has failed to take the necessary precautions due from every person entering into contracts of any sort with another. The law affords him ample remedies, and if he fails to take advantage of them, it is his own fault.

In considering this branch of the case, His Honor, Judge LURTON (86 Fed. Rep., 387), said:

> "If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law,"

and cites in support of this —

Edwards vs. Kearsey, 96 U. S., 595.
Greenwood vs. Freight Co., 105 U. S., 13.
Denny vs. Bennett, 128 U. S., 489.
Smith vs. Parsons, 1 Ohio, 236.
Weil vs. The State, 46 O. S. 450.

And on page 388 of the report he further says:

> "Neither can the owner, be said, to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

THE SAID SECTION DOES NOT DENY TO CERTAIN CLASSES, TO-WIT: OWNERS OF BUILDINGS OR OTHER STRUCTURES DESCRIBED THEREIN, THE EQUAL PROTECTION AND BENEFIT OF THE LAW AS GUARRANTEED BY ARTICLE I, SECTION 2, OF THE CONSTITUTION OF THE UNITED STATES, AND BY THE CONSTITUTION OF OHIO AND IS NOT IN CONTRAVENTION OF ANY PROVISION OF EITHER THE CONSTITUTION OF THE UNITED STATES OR THE STATE OF OHIO.

It is claimed by counsel that the whole subject of mechanics' liens comes within the limits of so-called class legislation, and is, therefore, inhibited by the guaranty of equal protection and benefit to all people. So far as we have been able to find, there are but two adjudicated cases in which the power of the legislature to pass any mechanics' lien law, has been questioned upon this ground.

> "The lien given to mechanics on the land upon which they have erected a building, the lien of the landlord upon the growing crop of his tenant, the exemption of certain articles from legal process in favor of heads of families, and of a portion of his earnings in favor of the laborer are instances of such legislation about the constitutionality of which there has never been any doubt."
>
> *Davis vs. The State*, 3 Lea. (Tenn.), 380.

> "Nor is the grant of this remedy by motion in violation of Sec. 8, Art. 2, of the Constitution, which forbids partial or class legislation. Every citizen in the

State may bring himself within its operation by contracting for the erection of a house, which most men do, in the couse of a life time."

"Whether a given law may be extended to any member of the community who may be able to bring himself within its provisions is the correct criterion by which the Courts are to determine its validity or invalidity under that section of the constitution."

12 Heisk, 633;
14 Lea, 520;
16 Lea, 71;
86 Tenn., 272;
3 Lea, 380;
87 Tenn., 214;
10 S. W. R., 353.

"After very careful consideration of all the sections of the act, we have no hesitancy in holding them to be constitutional and valid."

Cole Manufacturing Co. vs. Falls, 90 Tenn., 471.

That legislation of this character is not such as is prohibited for the reason that it confers unequal benefits, or imposes unequal burdens, and is not class legislation, seems to us beyond controversy. It is confined to no particular class, nor to any particular calling, but applies to all alike, who are erecting or who may erect buildings or other structures mentioned in the act, and to all who contribute anything of any nature be it either in work or materials, to the erection of such building or structure.

"Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors, or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether any particular rules shall extend to the whole State and all its citizens, or on the other hand, to a

subdivision of the State, to a single class of citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislators may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. The discriminations are made constantly, and the fact that the laws are of a local or special operation only, is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a special lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the Legislature must judge."

Cooley's Constitutional Limitations, p. 482.

"The special regulations for one kind of business which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon another business of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or

are held entitled to different privileges under the same conditions; it is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

Hing vs. Crowly, 113 U. S., 708.

"The fourteenth amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civic rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs and enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessity of society, legislation of a special character having these objects in view, must often be had in certain districts, such as for

draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fire, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just grounds of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it effects alike all persons similarly situated, is not within the amendment."

Barbier vs. Connolly, 113 U. S., 31.

It is true that the Court in that case was construing so-called police powers. But the "police power" is a broad and comprehensive term. It is "broad and plenary as the taxing power (as defined in *Coe vs. Errol*, 116 U. S., 517), and property within the State is subject to the operation of the former, so long as it is within the regulating restrictions of the latter."

Kidd vs. Pearson, 128 U. S., 1.

It covers all things which tend to conserve and promote the public health, welfare and convenience, and certainly the erection of buildings come within the scope of such powers. The universal occupation of mankind is, out of the products of the earth, to add to it again, in the shape of buildings, or other structures contemplated by the statute. The lien provided is upon all conceivable human constructed objects attached to the earth or upon or in the water. No possible subject is more appropriately within the "police power," nor more necessary to the welfare of society.

See—

Lehman vs. McBride, 15 O. S., 473;
City of Cincinnati vs. Caroline Steinkamp, Weekly Law Bulletin, Vol. 35, p. 185;
Kelly vs. The State, 6 O. S., 269;
McGill vs. State, 40 O. S., 328;
State vs. Powers, 38 O. S., 54.

> "And by the equal protection of the laws is meant equal security under them to every one on similar terms, in his life, his liberty, his property, and in the pursuit of happiness."

Railroad Tax Cases, 13 Fed. Reporter, 722;
County of Santa Clara vs. S. P. R. R., 18 Fed. Rep., 385 .

There are upon the statute books of Ohio many laws which apply only to certain classes, the constitutionality of which has never been doubted. The exemption of the homestead, or of a sum in lieu thereof in favor of the head of the family; the exemption of a portion of wages and of certain goods and chattels from execution, apply only to a portion of the citizens, but the power of the Legislature to enact such a law has never been questioned.

The law regulating the rate of interest is another law of the same class. But the Supreme Court of Ohio seems to have no doubt of the constitutionality of such an act, for in *Smith vs. Parsons* it says:

> "It is admitted that the States have not given up the entire power of legislating on the subject of contracts. They may, for instance, pass laws preventing usury, and fixing the interest of money."

Applying the rule of *Barbier vs. Connolly*, 113 U. S., 32, the mechanics' lien operates alike upon all persons and property under the same circumstances and conditions. It affects alike all persons similarly situated, and is not obnoxious to the constitution of either Ohio or of the United States.

The common law gave to the warehouseman and wharfinger a lien on the goods deposited with him for his labor;

to the inkeeper upon the effects of his guest for food and lodging, recognizing the natural necessity and justice of imposing upon and imparting to such contracts burdens not agreed upon specifically by the contracting parties.

Arising out of and suggested by such common lien law upon personal property has grown the legislation under consideration. Possession of the real estate cannot be held by the laborer or mechanic until his claim be paid, therefore out of necessity the law has protected him.

> "Its principles are believed to be founded on natural justice and equity, in that he who shall have enhanced the value of the real estate by his labor, or by the materials supplied in its erection, shall have a preferred claim on the property to secure the payment of such labor and materials."
>
> Overton on Liens, 533.

DECISIONS IN OTHER STATES HOLDING MECHANICS' LIEN STATUTES, SIMILAR TO THAT OF OHIO, TO BE CONSTITUTIONAL.

Legislation of the sort complained of, is neither new to the statute books, nor to the Courts of last resort in the various States. In nearly all of the States of the Union identical or similar statutes, under similar constitutions are, and have been, in force for many years.

The Supreme Courts of over twenty States have passed upon them. Every question raised as to the constitutionality of the act has been repeatedly adjudicated previous to the Ohio decision, and with two exceptions, viz.: The Supreme Court of Michigan in *Sphey vs. Sault St. Marie Savings Bank*, 77 Michigan, 199, and the Supreme Court of Pennsylvania, in *Waters vs. Wolf*, 162 Pa. State, 153, all Courts of last resort, have held the legislation constitutional, neither in violation of the obligations of contracts, nor a seizure of property without due process of law.

In New York the constitutionality of an act like the Ohio act was twice raised, and both times the act held to be constitutional. The New York Statute is as follows:

"SECTION 1. Any person or persons, firm or firms, corporations or association, who shall hereafter perform any labor or services or furnish any materials which have been used or which are to be used in erecting, altering, or repairing any house, wharf, pier, bulk-head, bridge, building or appurtenance to any house, building, and building lot, including the fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees, or who shall hereafter perform any labor or services, or furnish any materials which have been used or which are to be used in improving, or equipping any house, building, or appurtenance with chandeliers, brackets, or other fixtures, or apparatus for supplying gas or electric light with the consent of the owner as hereinafter defined, or his agent, or any contractor, or sub-contractor, or any other person contracting with such owner to erect, alter, repair, improve or equip as aforesaid, within any of the cities or counties of this state, may, upon filing the notice of lien prescribed in the fourth section of this act for a lien, for the principal and interest of the price and value of such labor and material, upon such wharf, house, pier, bulk-head, bridge, building or appurtenance, as upon the lot, premises, parcel or farm of land, upon which the same may stand or be intended to stand to the extent of the right, title, and interest at that time existing of such owner, whether owner in fee of the estate, or whether a lessee for a term of years, or vendee in possession under a contract existing at the time of filing of such notice of lien, or of the owner of any right, title or interest in such estate which may be sold under an execution under general provisions of the statute in force in this State relating to liens of judgment and enforcement thereof, etc., but in no case shall such owner be liable to pay by reason of all the liens filed pursuant to this act, a greater sum than the price stipulated and agreed to be paid in such contract and remaining unpaid at the time of filing such lien; or in case there is no contract then the amount of the value of such labor and material then remaining unpaid."

In discussing the constitutionality of this section the New York Supreme Court in *Blauvelt vs. Woodworth*, 31 N. Y., 285, said:

> "It is insisted that if this be the act, it is unconstitutional and void, as it may enable the claimant to reach the property of a third party without due process of law. There is no provision in the constitution which precludes the Legislature from declaring a statutory lien in respect to future contracts in favor either of the contractor, sub-contractor or the laborer, upon the land of the owner, at whose instance, and for whose benefit the services are performed.
>
> "The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modifications, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

The question of the constitutionality of this section was again raised in the case of *Glacius vs. Black*, 67 N. Y., 567. In its opinion rendered in that case the Supreme Court of New York said:

> "There is no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as the Mechanics' Lien Laws."

By the Court:

> "The constitutionality of the legislation known as mechanics' lien laws, was affirmed in *Blauvelt vs. Woodworth*, 31 N. Y., 285, and the Court held there was no constitutional objection to the creation by the Legislature of statutory liens in favors of mechanics and others for the purpose and under the circumstances and limitations specified in those statutes.
>
> "Laws of similar character have been in force in this State for more than forty years (Laws of 1844, Ch. 220), and similar legislation is found on the statute

books of many of the States. These statutes have been frequently under consideration by the Courts, and so far as we have known, their constitutional validity has never been judicially questioned.

"We do not doubt the soundness of *Blauvelt vs. Woodworth,* and if the question admitted of doubt, we should not feel at liberty, under the circumstances, to consider the decision in that case."

In the case of *Gunney et al. vs. Walsham,* 16 R. I., 698, the constitutionality of an act similar to the act of Ohio was affirmed, and in its opinion the Supreme Court of Rhode Island said:

"Chapter 696 is not unconstitutional as regards an owner of an estate who makes a contract for the erection of a building thereon after the laws went into effect, though at the time the material-man recorded his lien the contractor had been paid in full.

"We do not think that said chapter can be held to be unconstitutional, as regards the defendant, because it impairs the obligation of contracts. The chapter was passed and went into effect before the defendant's contract in May, was entered into, and, therefore, said contract must be held to have been entered into subject to its provisions."

Section 1183 of the California Statutes providing for a lien for mechanics, material-men, contractors, and sub-contractors, etc., is a law similar to the Ohio Statute. In the case of *Hicks vs. Murray,* 43 Cal., 514, the constitutionality of the act was affirmed. In its opinion, the Supreme Court of California said:

"The mechanics' lien law of 1868 is not open to objection that it is unconstitutional on the ground that it attempts to appoint agents for private persons nor that it confiscates property, nor as to the notice required of owners as to the responsibility for improvements, nor that it attempts to take away vested rights or clothe private persons with power to divest citizens of their property."

In *Atwood vs. Williams,* 40 Me., 409, the Court held, under a similar statute, that the material-men and laborers might enforce their claims as against the owner even though the contractor, under and for whom they worked, had been paid in full.

The Maine Statute there construed was as follows:

> Chapter 125, Sec. 35: "Any ship carpenter, caulker, blacksmith, joiner or other person, who shall perform labor or furnish materials, for or on the account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages, or materials, until four days after such vessel is launched, or such repairs afterwards have been completed, and may secure the same by an attachment on said vessel within that period, which shall have precedence of all other attachments.
>
> Sec. 37: "Any person who shall perform labor or furnish materials for erecting, altering, or repairing any house, or other building, or appurtenances, or furnish labor or materials for the above purposes by virtue of any contract with the owner thereof, or other person who had contracted with such owner, shall have a lien to secure the payment of the same, upon such house, or building, and the lot of land on which the same stands, and upon the right of redeeming the same when under mortgage, and such lien shall continue in force for the space of ninety (90) days from the time when such payment becomes due."
>
> See also, *Spoffard vs. True,* 33 Me., 283.
> *Taggart vs. Buckmore,* 42 Me., 77.

To the same effect is *Taylor vs. Murphy,* 148 Pa. State, p. 337, although this is one of the cases relied upon by the appellant. The Court there say:

> "It is no defense to such lien that the aggregate amount out of the liens entered against the building, together with the costs of building the same, exceed the contract price, if the materials furnished are of the quantity and quality needed for its construction."

"As soon as owners of lots cease to be their own builders, they put it in the power of persons employed by them to occasion losses to mechanics and materialmen which they ought not to bear, and it was to remedy this mischief that the Legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just, but a convenient one."

Wheeler vs. Miller, 18 Pa. State, 52.

Section 6229 of the Revised Statutes of Minnesota provides as follows:

"All persons who have performed labor, or furnished skill, material or machinery for the construction, alteration or repair of any boat, vessel or other water craft, or for the erection, alteration, repair or removal of any house, mill, manufactory or other building, or appurtenance, or any fixture, fence, wharf or other structure, by virtue of a contract with, or at the instance of, the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the contract price or value of the same upon such boat, vessel or other water craft, and upon such house, mill, manufactory or other building, or appurtenance, or fixture, bridge, wharf, fence or other structure, and upon the right, title and interest of the owner thereof, and in and to the lands upon which the same is situate, or to which it may be removed, not exceeding forty acres. If without the corporate limits of any city or incorporated illage, and if situated upon or removed to lands within the corporate limits in such city or incorporated village, then, in and to the lot of land upon which the same is situate or to which it may be removed, not exceeding one acre in extent."

This statute was held to be constitutional in the cases of

O'Neil vs. St. Olaf's School, 26 Minn., 329.
Bohn vs. McCarthy, 29 Minn., 23.
Laird vs. Noonan, 32 Minn., 358.

In the last named case the Supreme Court of Minnesota, in its opinion, said:

"As such liens are encumbrances upon the owner's title, they can only be created by his consent or authority; and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the contractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract. The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned, by making a contract while such is the law."

"As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his consent is implied. To avoid the encumbrance of such liens the owner takes the burden of securing the bond which is authorized by the act to take. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the person whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred."

Spoffard vs. True, 33 Me., 283.
Taggart vs. Buckmore, 42 Me., 77.

"It is ordinarily understood, from the nature of the case, that under building contracts the work is not to be done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged."

In Tennessee just such an act as the act herein complained of was upheld, though most vigorously assailed, as beyond legislative power. One of the most recent and thoroughly considered cases upon the subject is that of *Cole Manufacturing Company vs. Falls*, 90 Tenn., 471:

"1. Act Tenn., 1889, Ch. 103, which provides that every person who is employed by the contractors to furnish materials for a building shall have a lien on the building for the same, provided that within thirty (30) days after the building is completed, he shall notify the owner that he claims a lien, is not unconstitutional in that it allows the taking of property without due process of law."

By the Court:

"The lien given by act of 1845 has been endorsed by this Court, in many cases, without the expression of even a doubt as to the constitutionality of the enactment; and there is as little room for doubt with respect to the validity of the amendatory act of 1881. The corresponding provision of the act of 1889 is assailed upon the presumption —

"(1.) That it undertakes to appropriate the property of the owner for the benefit of a person with whom he had made no contract.

"(2.) That this result may be accomplished, though the owner has no notice of the claim until after he has paid the original contractor in full, and,

"(3.) That the aggregate of the claims of sub-contractors and material-men may exceed the amount

agreed to be paid the original contractor, in which case the owner may be compelled to pay more than the contract price for the advantages received. The provisions are not fairly subject to all these animadversions, and such of them as are well made do not render it obnoxious to the constitution. It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act, for the owner must be held to have a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor and gave out his work in reference to that law. The right of lien to sub-contractors and material-men is, by operation of law, incorporated into and made part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the sub-contractor and material-men in certain contingencies, hence the owner who makes the contemplated contract cannot justly complain of the legal result; especially when he receives the benefit of the labor and material of those for whom the lien is provided and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing.

"We find no valid constitutional objection to the first section of the present act. It does not provide for or allow the taking of property without due process of law or the law of the lands, and hence is not in violation either of Section 1 of the 14th amendment of the Constitution of the United States, or of Section 8, of Article 1, of the Constitution of Tennessee. Statutes similar to the provision made in the first section of our act of 1889 have been upheld and approved by the Supreme Court of the United States, and by the Courts

of last resort in most of the States of the Union. In a very small minority of the States has the validity of such legislation been denied by the Courts."

See also *Reeves vs. Henderson*, 90 Tenn., 521.

"The act of the legislative assembly, appr. January 12, 1872, (Code Ch. 40), secures liens to mechanics for their labor, and confers upon the District Court chancery jurisdiction to determine the rights and priorties of the liens of mechanics and mortgagees.

"The sixth section of the organic act of the territory provides: 'That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and provisions of this act.' Held, that said act of the legislative assembly is constitutional, and also that said act secures a lien to a mechanic for work which has not been performed under any contract."

2 Montana, 115.

Sections 3018 and 3020 of the Connecticut statutes provides:

"Section 3018: Every building in the construction or repair of which or of any of its appurtenances, any person shall have a claim for materials furnished, or services rendered, exceeding $25.00 in amount, by virtue of an agreement with or by consent of the owner of the land on which such building is erected, or such persons have authority over the original acting for such owner in procuring such labor or materials shall, with the land on which the same may stand, be subject to the payment of such claim, and said claim shall be a lien on such land, building or appurtenances, and shall take precedence of any other encumbrance originating after the commencement of such service or the furnishing of such materials."

"Section 3020: No person other than the original contractor for a building, or a sub-contractor whose contract with the original contractor is in writing, and

has been assented to in writing by either party to such original contract, shall be entitled to claim any such lien unless he shall, within sixty days from the time he shall have commenced to furnish materials, or rendered services, give written notice to the owner of such building that he has so commenced to furnish materials or rendered services, and intends to claim a lien therefor on said building. No sub-contractor with or without a written contract complying with the provisions of this Section shall be required to obtain an agreement or consent of the owner of the land as provided in Section 3018 to enable him to claim a lien under this Section."

Construing this Act, the Court say:

"To apply and enforce the statute in a case like this works no injustice. Every owner of real estate knows the law. When he employs an agent to construct or repair a building, he knows the liability he incurs under the lien law, and may easily protect himself, and it is not unreasonable to require him to do so; while it would be hardship to require mechanics, when the owner is unknown, to know the terms of the agency, and to ascertain the nature and extent of the private instructions to the agent. We conclude, therefore, that the peculiar principles of the law of agency, which relate to undisclosed principals, must yield to the provisions of the statute."

Paine vs. Tillinghast, 52 Conn., 532.

1. "Kentucky Statutes 2463, giving a lien to a person who performs labor or furnishes material, in the erection of a building by a contract, that 'The owner, contractor, sub-contractor, architect or authorized agent' is not unconstitutional, though it gives a lien without regard to the state of the account between the owner and the contractor."

Hightower vs. Bailey et al., Court of Appeals of Kentucky.

56 Northwestern Reporter, page 147.

By the Court:

"This Statute is radically different from our former law on this subject, and has not heretofore been before this Court for construction. The preceding Statute, while giving liens to contractors, sub-contractors, material-men and laborers, practically thereby provides a process of garnishment in the hands of the owner of any money he might owe the contractor. Its progress was merely to subject the contractor, material-man, and laborer to the rights of the contractor and was effectual only in the event the owner was indebted to the contractor, it was entirely safe for the owner, without notice of the claims of others, to pay his contractor when he pleased, even in advance. The present Statute has clearly meant to fasten, and does fasten, on the property of the owner a lien for the claim of the sub-contractor, material-man and laborer, although the owner has no notice of such claims, and may owe the contractor nothing. When applied to the facts of this case, assuming that Hightower is a material-man and Clark a sub-contractor, within the meaning of the Statute, the law gives Hightower a lien on the lot and improvement of Walling & Company, without regard to the state of account between the owners and the contractors. * * * The law under which a contract is made is a part of the contract, as much as though it were incorporated into it. When appellant contracted with the defendants, Smith Brothers, whereby he contracted to pay them for the erection of the building as it progressed, and did so, it was at his risk, for the law which was part of the contract, said: 'If there are sub-contractors who furnished material or performed work for this contractor, they shall have their full pay; if the contractor does not pay them, the owner of the building must pay them; if he does not, they shall have a lien upon the building for sixty days, at least, to enforce their payment.' The inconveniences of the law do not seem to us to be insuperable. They are based upon the rule or supposed hardship that in many instances it subjects the owner to the

liability of making double payments for the same work or material, and prevents him from making contracts for the erection of building, and the furnishing of materials to be paid for otherwise than in money and many other similar inconveniences. These might have much force, if addressed to the Legislature, the law-making body, and we may have very serious doubt as to the policy or the necessity of such a law, and we might with propriety recommend to the Legislature that it would be wise and beneficial that it should be changed in this particular; yet these considerations cannot have much weight against the clear unequivocal terms of the Statute."

"1. A sub-contractor who furnishes materials, and lumber, or labor, not to the owner, but to the contractor, for the erection of a new building, can under the provisions of Sections 5469 and 5470, Comp. laws, acquire and enforce a lien on the building, and on the interest of the owner of the real estate on which the building stands, to the extent of the value, or the price agreed to be paid by the contractor for the material, lumber or labor furnished.

"2. A lien, if filed within 60 days after the delivery of materials or lumber, or after the labor is performed, is not defeated by the fact that the owner, before the filing of such lien, has paid the contractor in full for the work and materials performed and furnished.

"3. If a sub-contractor files his claim within 60 days after he has furnished the material, or performed the labor, he is entitled to his lien without any further notice than such filing may give the owner.

"4. It is not the contract between the contractor and the owner which supports the lien under the statute, but it is the use of the materials and work upon the premises, the putting of them into the building, and attaching them to the freehold, whereby the owner is benefited by them, which entitles the party furnishing them to a lien to the extent of their value."

First four sections of the syllabus in case of *Albright et al. vs. Smith,* Supreme Court of South Dakota, 51 Northwestern Reporter, page 590.

"The law is remedial in its character, and is intended to secure the parties entitled to its benefits for their work and material, provided they employ the means, and adopt the rules fixed by the law to obtain and secure their rights."

Overton on Liens, 532.

"Sec. 3313, Rev. Stat., as amended by chapter 33, laws of 1889, giving sub-contractors a lien for the amount of their claims for labor performed or materials furnished in or about a building without regard to the contract price of the building, or the sum due from the owner to the principal contractor, but providing that the principal contractor shall defend any suit to enforce such lien, and giving the owner a remedy over against him, is a valid law."

Mallory vs. LaCrosse Abbatoir Co., 80 Wis., 170.

"The power of a Legislature as to all future transactions to regulate and control contracts, by prescribing the manner in which they shall be made, by declaring what future voluntary acts of parties in relation to a particular subject-matter shall be deemed a contract, and, if it pleases, by creating implications from which certain declared obligations shall flow, cannot be denied or doubted."

Mallory vs. LaCrosse Abbatoir Co., 80 Wis., 177.

"The right to enforce a mechanics' lien against the property of the owner in the case of materials furnished his contractor, is not founded upon privity of his contract with the owner, but rests solely upon statutory law. The lien attaches upon delivery of the material, and upon compliance on the part of the material men with the provisions of the law, and this, too, irrespective of a contract, either express or implied, on the part of the owner.

"The right of the material-man to his lien does not depend on, nor is it in any manner affected by the

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question whether the owner has or has not money in his hands due the builder, nor whether the former has performed his part of the contract to the letter."

Treusch et al. vs. Shyrock et al., 51 Md., 162.

The validity of an act similar to the act herein complained of was sustained in the Supreme Court of Indiana in the case of *Colter vs. Frese*, 45 Ind., 96.

The same question was also considered by the Indiana Court in the case of *Andis vs. Davis*, 63 Ind., 17-20. In that case the Court says:

"In this case the owner had fully paid the contractor before notice was filed, and the Court say that the facts alleged in that part of the answer were not sufficient to constitute a defense to appellee's action by his compliance with the requirements of the statute, and appellee had acquied a valid lien upon the appellant's house and real estate for the amount due the appellee for work done by him in the creation of said house. It is well settled by the decisions of this Court that the appellee's lien was not defeated by the alleged payment by the appellant to Norford of the full amount due or to become due to him on account of the erection of said house."

In the case of *Smith et al. vs. Newbaur*, 114 Ind. Reports, the first two sections of the syllabus are as follows:

"Constitutional Law. Due Process of Law. Mechanics' Lien. Statute Construed. Section 7257, R. S., 1894, providing that a mechanics' lien may be acquired by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law.

"Mechanics' Lien. For Materials Furnished to Contractor or Sub-contractor. A lien may be acquired for materials furnished for a building to either a contractor or sub-contractor, under Section 7255, R. S., 1894, placing them in the same category, so far as the right to acquire a lien is concerned."

The Court in its decision in this case says:

"The action was brought under the provisions of the mechanics' lien law of 1883 (Acts 1883), 140, as amended by the act of 1889 (Acts 1889, 257) and by the act of 1891 (Acts 1891, 28), Section 7255, R. S., 1894 (Section 1688, Ell. Supp.), and following sections.

"In support of the demurrer to the complaint, it is first contended that the mechanics' lien law of this State is invalid, as repugnant to Section 1, Art. 14, of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law. This contention is based upon the provisions of Section 3 of the mechanics' lien law (Section 7557, R. S., 1894; Section 1690, Ell. Supp.), which provides that any person wishing to acquire such a lien upon any property shall file in the recorder's office, 'at any time within sixty days after performing such labor or furnishing such materials,' notice of his intention to hold such lien.

"This notice, the only one provided for in the statute, is insufficient, say counsel, to secure that due process of law referred to by the Federal Constitution before the fixing of a lien upon the citizen's property. Under the law as enacted, counsel contend, any one may perform labor or furnish material in the construction of a building for a land owner, without such owner's knowledge or consent, and then secure a lien upon the land and building by notice filed after the work is done or materials furnished. It is said that the property owner should have notice at or before the doing of the work or the supplying of the materials, so that he may, if he wishes, prevent the doing of such work or the furnishing of such materials, and so keep his property free of the lien.

"It has often been held that every statute under which a contract is made enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property,

are therefore chargeable with knowledge of, and are bound by, all of the provisions of our mechanics' lien law then in force. By the terms of the agreement entered into the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished, and the law under which the contract was made was further notice that the building and ground upon which it was to be erected would be liable to a lien for the value of the materials so furnished. The only uncertainty left was whether those who should furnish the material would claim the lien therefor. That uncertainty is provided for in the statute, which requires that the notice of intention to hold the lien be filed in the recorder's office within sixty days. The owner has, consequently, ample means of protection, and is not liable to a lien without notice, nor to have his property taken without due process of law.

"It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. These, however, are considerations that should be addressed to the Legislature, and not to the Courts. Besides, it is to be remembered that without the right to a lien on the property, laborers and material-men would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands all parties are secured in their rights. The owner, by seeing that laborers and material-men are paid, or by keeping back for sixty days from the contractors sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time the man whose labor or material has gone into the building can look to the

building itself and to the ground upon which it stands for his security. The property owner enjoys the benefit of this work and of this material, and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for."

On petition for rehearing the above case the decision was affirmed.

Code Wash. T., Sec. 1957, provides:

"That every person performing labor upon or furnishing material to be used in the construction of a building has a lien therefor, whether furnished at the instance of the owner or his agent, and that for the purpose of the act, every contractor, etc., shall be held to be the owners agent. By Sec. 1965 the owner may avoid a lien by posting a notice as therein directed.

"Held: That the material-man or laborer has a lien, notwithstanding payment to the contractor."

1 Wash. Rep., 609.

"Notice and affidavit having been furnished as required by law, by sub-contractor to owner, the latter is liable to former for amount named in the affidavit, regardless of state of accounts between owner and general contractor."

N. & W. Ry. Co. vs. Howison, 81 Va., 125.

"That which is given for the preservation or betterment of the common pledge, is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens, over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States."

Provident Institute vs. Jersey City, 113 U. S., 516.

To the same effect see *Brooks vs. Railway Company,* 101 U. S., 446.

An Act of the District of Columbia, identical in principal with the provisions of Sec. 3184, has been construed and enforced by the Supreme Court of the United States in *Windsor vs. Caldwell,* 14 Howard, p. 434. We quote from the opinion of the Court upon pages 444 and 445:

> "The remaining bills of exception involve, in fact, but one prominent and important question, and the decision of it will dispose of this case:
>
> "The right to file a 'mechanics' lien' as it is usually denominated, is claimed by the plaintiff under the Act of Congress of March 2nd, 1833, entitled 'An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia.' The first section of this act, defines the persons who shall be entitled to this peculiar security and remedy, as follows:
>
> "'All and every dwelling house, and other building, hereafter constructed and erected within the city of Washington, in the town of Alexandria, or in Georgetown, in the District of Columbia, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmaker, blacksmith, plasterer, and lumber merchant, or any other person or persons employed in furnishing materials for, or in erecting or constructing such house or other building, before any other lien which originated subsequent to the commencement of such house or other building. But if such dwelling house or other building, or any portion thereof, shall have been constructed under contract, or contracts, entered into by the owner thereof, or his or her agent, with any person or persons, no person who may have done work for such contractor, or contractors, or furnished materials to him, or on his order or authority, shall have or possess any lien on said house or other building, for work done, or materials so furnished, unless the person or persons employed by such contractor to do work on, or furnish materials for,

such building, shall within thirty days after being so employed, give notice in writing to the owner or owners of such building, or to his or their agent, that he or they are so employed to work or to furnish materials, and that they claim the benefit of the lien granted by the act.'

"Does a master-builder, undertaker, or contractor who undertakes, by contract with the owner to erect a building, or some part or portion thereof, on certain terms, come within the letter or spirit of this act, or within any of the classes enumerated, as entitled to this special remedy? Such persons have an opportunity, and are capable of obtaining their own securities. They do not labor as mechanics, but superintend work done by others. They are not tradesmen in lumber, or other materials for building, but employ others to furnish materials. If such contractor should be accident, be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities.

"The title to this act shows its policy and intention. It is to secure to 'mechanics and others, payment for labor done and materials found;' and the persons enumerated in the first section are, plainly, those mechanics and tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertaker or contractors, who employed them. The act contemplates two conditions, under which such labor and materials may have been furnished: First, on the order of the owner, who may act without the intervention of any middleman, and thus become indebted directly to his mechanics and tradesmen. Or, secondly, when they have been furnished on the order of contractor or undertaker. In such cases, the mechanic or material-man, if he intends to look to the credit of the building, and not to that of the contractor with whom he deals, must give notice to the owner of the building, within thirty days, of his intention to claim this security. The contractor, though mentioned in the act, is not enumerated among those entitled to its

benefit. The aim and policy of this act is also obvious.. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings or incumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor, or middleman, pays his price and receives his building without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection to those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated."

The Circuit Court of the United States, in *Puritan vs. The Hull of a New Ship,* 2nd Curtis, 416, has also construed and enforced upon the same ground, a statute of Maine quoted in said case, which contains the same provisions as Section 3184.

"That mechanics' lien laws are constitutional has been decided in a multitude of cases. They have been attacked as depriving persons of their property without due process of law, as being class legislation, as impairing the obligation of contracts, and as interfering with the right of trial by jury, and they have been declared by the Courts to be free from all these objections."

* * * * * * * * * * *

"But although these laws have in general been held constitutional, they sometimes contain unconstitutional provisions; so it will be necessary to examine the subject more in detail. The principal attack of these laws

on constitutional grounds has been directed towards the provisions giving liens to sub-contractors and material-men in the second degree, it being argued that, as there is no privity of contract between them and the owner, it was depriving him of his property without due process of law, to subject it to a lien for the contractor's debts to them. It was probably in order to meet this objection that same of the acts are declaring that the contractor shall be deemed the agent of the owner, thus bringing the owner and sub-contractor into privity of contract. But even without this provision, the acts giving these persons liens are not unconstitutional, since, when the owner enters into contract with the contractor, he does so with the conclusive knowledge of the law, and the provisions of the mechanics' lien law enter into and form a part of his contract. And it makes no difference that the statute allows sub-contractors to have liens aggregating more than the entire contract price named in the original contract, or that it allows them a lien in certain cases, even though the owner has paid the contractor in full."

Boisot on Mechanics' Liens—Sec. 22-23.

Chapter 191, Public Statutes of Massachusetts, provides:

"Section 1: Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration and repair of a building or structure upon real estate by virtue of an agreement with or by consent of the owner of such building or structure, or of any person having authority over or rightfully acting for such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situate, to secure the payment of the debts so due to him, and the costs which may arise in enforcing such lien, except as is hereinafter provided."

"Section 2: When the agreement mentioned in the preceding section is for labor performed or furnished,

and for materials furnished upon an entire contract and for the entire price, a lien for the labor alone may be enforced, if it can be distinctly shown what such lien was worth, but in no case shall such lien be enforced, for a sum greater than the price agreed upon for the entire contract."

"Section 3: No lien shall attach for materials furnished unless the person furnishing the same before so doing gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such material, that he intends to claim such lien."

"Section 4: The owner of a building or structure in the process of erection or of being altered or repaired, if he is the person other than the party by whom or in whose behalf the contract for labor and material has been made, may prevent the attaching of a lien for labor not at the time performed, or for materials not then furnished, by giving notice in writing to the person performing or furnishing such labor or furnishing such materials, that he will not be responsible therefor."

Under this Statute it has been held:

"It is no defense to a petition to enforce a mechanics' lien, under public Statute 191, for labor performed for a contractor upon the respondent's house, that the material furnished by the contractor was not of the quality called for by the contract and the petitioner's work, through no fault of his, was a damage to the house. * * *

"Our statute gives an immediate lien to any one who has performed labor in the repair of a building by the consent of its owner. Even if he is employed by a contractor, the laborers lien is not by way of subrogation, and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land."

Bowen vs. Phinney, 162 Mass., 593.

"Such liens in favor of sub-contractors would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be cognizant, gives his irrevocable power to his contractor, to charge and bind his estate; and when such power is executed by the actual making of such sub-contract for labor it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

Donahy vs. Clapp, 12 Cush. (Mass.) Reports, 440.

The Missouri Statute is:

"Section 6750: Every mechanic, or any person, who shall do or perform any work or labor upon, or furnish any material, fixture, engine, boiler or machinery for any building erected or improvements upon land or for repairing the same under and by virtue of any contract with the owner or proprietor thereof, or his agency, trustee, contractor, or sub-contractor, upon complying with the provisions of this article, shall have a lien for his work or labor done, or materials, fixtures, engines, boilers, or machinery furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor upon which the same are situate to the extent of one acre."

The Supreme Court, in *Henry & Coatsworth Co. vs. Evans*, 97 Mo., 47, say:

"The Mechanics' Lien Law, Rev. Stat. 1879, Sec. 3172 *et seq.*, gives a lien to sub-contractors for materials furnished by them to the contractor and used in the construction of the building, notwithstanding the full contract price of the building has been paid in good faith by the owner to the contractor, and such lien is not limited to the amount fixed by the contract of the owner, with the original contractors."

* * * * * * * * * * *

"It has already been decided that in no event can a sub-contractor assert a lien against the property for a

greater amount than the reasonable market value of the materials he furnished toward the erection of the buildings or improvements. 74 Mo., 37; 63 Mo., 295; but there is nothing in this or in any other section expressly limiting the aggregate liens to the amount which the owner agreed to pay to the original contractor for the completed work." * * *

"In the matter before us, the Mechanics' Lien Law is assumed to be in contemplation of all parties making a building contract. There is, hence, no injustice in treating them as having accepted the consequences fixed by that law."

REVIEW OF THE CASES CITED BY COUNCIL FOR PETITIONER AS SUSTAINING THE DECISION OF THE SUPREME COURT OF OHIO.

Counsel for appellant herein cite in support of the conclusion reached by the Ohio Court:

Sprey Lumber Co. vs. Sault St. Marie Savings Bank, 77 Mich., 199;
Waters s. Wolf, 162 Pa. St., 153;
Myer vs. Burlandi, 39 Minn., 438;
Henry vs. Rice, 18 Mo. Ap., 512;
Renton vs. Conley, 49 Cal., 189.

In *Sprey Lumber Company vs. Sault St. Marie Savings* Bank, no authorities are cited by the Court in support of its position, nor is there any pretense that the statute expressly violated any particular provision of the Michigan Constitution. So far as we can judge from the opinion, the sole reason for the decision was, that the Court did not like the law.

The decision in this case is materially modified in principle by the subsequent case of *Smalley vs. Gearing*, 121 Mich., 190.

Waters vs. Wolf, 162 Pa. St., 153, is fully discussed by Judge LURTON in his opinion, 86 Fed. Rep., 372.

We also refer the Court to the dissenting opinion of Judge MITCHELL in that case as being more in harmony with the

former decisions in Pennsylvania, and with the authority of other Courts upon this subject. Among other things, Judge MITCHELL says:

> "It is the province of the Legislature to declare the public policy of the State, including what contracts shall be lawful, in what form they shall be made, and what shall be their effect. From the earliest days of the republic it has done this without question, whenever the contract itself or its collateral effect touches matters of public interest or policy, of which the Legislature is the exclusive judge. Thus under statutes all leases for more than three years are at will only unless in writing no matter how explicitly the parties contract for a long term. Under statute, a loan of money is only a loan at six per cent., no matter how plainly the parties express their intent that it shall be at a higher rate. Under statute, as well as under the common law, partnership involves certain liabilities to third parties no matter how strictly the partners may contract among themselves to avoid this result. And the Courts with the least hesitation enforce the liability of a principal for the acts of his agent within the apparent scope of his authority, no matter how contrary to his orders in fact. But it is unecessary to multiply examples as the greatest example of all is the mechanics lien itself. It has no other basis than the incorporation of liability for work and materials into the contract for building, by legislative mandate, without the slightest regard to the actual intentions of the parties. No one who contracts for having a house built intends apart from statutory compulsion to give a sub-contractor or material-man a claim against him or his land any more than he contemplates when he orders a suit of clothes a liability to the merchant from whom the tailor buys the cloth, or to the workman who sews it together. The result follows from the statute alone, because the Legislature has enacted that a contract to build a house shall carry with it an authority to the contractor to pleadge not only the

house, but the land on which it is to be built, for payment of the labor and materials sold on the credit of it, even though the materials do not in fact go into it. It is the creation of an agency by the Legislature as a matter of public policy without regard to the will of the owner."

It will be found upon examination, that *Henry vs. Rice*, 18 Mo. Appeals, 512, was the decision of an inferior Court, and was distinctly held by the Supreme Court of Missouri in *Henry & Coatsworth Co. vs. Evans*, 97 Mo., 47, referred to above, not to be the law of Missouri.

Renton vs. Conley, 49 Cal., 189, does not hold the statute of California, which is similar to that of Ohio, to be unconstitutional, but following the decision of former cases, merely construes the law in a certain way. The decision of the Supreme Court of California in 43 Cal., 514, to the effect that a law similar to that in Ohio was constitutional in that State, is still unreversed and unmodified.

In *Myer vs. Burlandi*, 39 Minn., 438, the Court, while holding that the Minnesota Act of 1887, was void as a whole, by reason of certain unconstitutional provisions therein, also held that a former Act of Minnesota passed in 1878, Chap. 90, Minnesota Laws, remained in full force and was valid. The provisions of this former Act of 1878, were identical, as nearly as may be, with those of Sec. 3184, under consideration, and have been held by the Supreme Court of Minnesota to be constitutional in *Laird vs. Noonan*, 32 Minn., 358; *Bardwell vs. Mann*, 48 Minn., 285; *Burns vs. Sewell*, 48 Minn., 423; *Wheaton vs. Burg*, 50 Minn., 525.

The case of *Hampson et al. vs. The State of Ohio*, 8 Ohio, page 314, cited and commented upon by complainant's counsel, will be found upon examination to have no application to the principles involved in this controversy. It was a suit of equity, brought under a special statute authorizing the suit, and the hypothetical case proposed by the Court was based solely upon the conditions of that suit, and not with reference to any lien statute, or other statute containing provisions similar to the one under consideration.

The decision in *Young vs. The Lion Hardware Company* announces a new and momentous principle in the interpretation of constitutional powers. It was, in effect, and indeed in words, that of the propriety of legislation, the Court, equally with the Legislature, is to be the judge. Before this announcement it was considered axiomatic that within its powers the legislature alone is the judge of the policy or prudence of legislation. No man ever more forcibly announced and enforced this doctrine than did Judge SWAN in *Ex parte Bushnell*, 9th Ohio State, 77. No man ever more forcibly predicted than did he, the evils necessarily consequent upon any attempt on the part of the judiciary to interefere with the rightful exercise of legislative powers.

> "It is not a part of the functions of a Court to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."
>
> *Powell vs. Pennsylvania*, 127 U. S., 685.

The Ohio Court does, by its opinion, attempt "to conduct investigation of fact and enter into the question of public policy merely." It does, in effect, frustrate the legislative will embodied in the statute. There is no assertion in this decision that the law in question violates any specific provision of the constitution. There is no finding that the obligation of any contract is impaired, nor that any citizen is deprived of his property without due process of law. The sole ground of the decision is, that the Court, as well as the General Assembly, is to judge whether or not legislation imposing any restraint upon the right of contract, is for the public welfare, protection and benefit. The logical result of this decision is, that the Court is the sole judge as to whether such legislation is for the public welfare, protection and benefit, for the Court is the final judge. If it can determine, as it did in this case, that liens provided by statute are not for the public welfare and benefit, it can equally determine that interest laws, homestead laws, exemption laws, and all matters of like character are or

are not for the public welfare, protection and benefit. It attempts in this decision to evade the settled rule that statutes become a part of contracts thereafter entered into by holding that this only applied to "valid" statutes, using "valid" in the sense of "wise" or "proper." But this brings us back to the same question: Who is to determine as to the validity of the statutes in that sense? The Court or the Legislature, within its legitimate powers? If the Court, then the Court legislates as effectually as if its seal were affixed to the statute.

In conclusion we might say, that the acquiescence almost without exception, of both the judicial and legislative powers of all the States and of the United States in the right, within its discretion, of the Legislature to create liens known as mechanics' liens, and to regulate the method and manner of enforcing them, and to prescribe the rights of the various parties thereto, not only justifies this Court in upholding the constitutionality of the act in question, but forbids its doing otherwise. If the principle be wrong, then in the language of the Supreme Court of Massachusetts, *Roders vs. Goodwin*, 2 Mass., 475: "We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law."

Respectfully submitted,

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